

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-1152

RP

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1152

In the Matter of the Petition for Arbitration

Between

FAIR WIND MARITIME CORPORATION
As Owner of the S.S. *Isabena*,

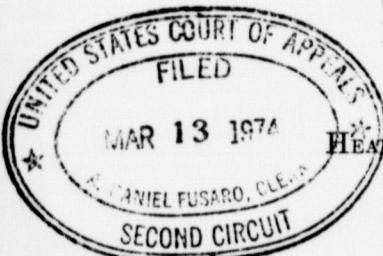
Petitioner-Appellee,
—and—

TRANSWORLD MARITIME CORPORATION,

Respondent-Appellant.

JOINT APPENDIX

H. BARTON WILLIAMS
c/o Messrs. Gifford, Woody, Carter
& Hays
One Wall Street
New York, New York 10005
*Attorney for Transworld Maritime
Corporation*



HEALY & BAILLIE
29 Broadway
New York, New York 10006
*Attorneys for Fair Wind Maritime
Corporation*

PAGINATION AS IN ORIGINAL COPY

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Docket Entries

DATE	PROCEEDINGS
6-19-73	Filed petition to compel arbitration.
Jun. 22-73	Filed Notice of Hearing on Petition to compel Arbitration. Ret. 7/7/73.
July 13-73	Filed Consent Order that Petitioner Fair Wind Maritime Corp., etc. for an order to compel arbitration be adjourned to 7/23/73, etc. Stewart J.
Jul. 23-73	Filed Affidavit in opposition to motion to compel arbitration, by Helen M. Ryan.
Jul. 23-73	Filed Petitioners Memorandum of law in opposition to petition to confirm arbitration.
Jul. 27-73	Filed Supplemental Affidavit in support of motion to compel arbitration by Nicholas J. Healy, Jr.
Jul. 27-73	Filed Reply Memorandum of law in support of petition to compel arbitration.
Aug. 30-73	Filed Memo. End. on motion dated 6/22/73. Petitioner motion is granted; respondents motion is denied. Submit Order on Notice. Pierce J. (mailed notice)
Sep. 25-73	Filed Respondents Notice of Motion Re: Alter or Amend Decisions ret. Sine Die.
Sep. 25-73	Filed Respondents Notice of Motion to Hold Decisions in abeyance pending decision in related motion. Re; Sine Die.

Docket Entries

DATE	PROCEEDINGS
Oct. 3-73	Filed Affidavit by Nicholas J. Healy, Jr., in opposition to petitioner's application to compel respondent to arbitrate.
Oct. 15-73	Filed (TWA) reply memorandum to pet'n affdvt responding to motion to amend or alter decision.
Nov. 28-73	Filed Opinion #40658. Respondent's motion is denied. Petitioner's application for fees is denied. Etc. Pierce J. (mailed notice)
Dec. 6-73	Filed Respondent Notice of Motion. Re: Final Order. ret. 12/11/73.
Dec. 11-73	Filed affidavit in opposition to motion to adjourn entry of judgment & in support of the proposed order of judgment by Nicholas J. Healy Jr.
Dec. 18-73	Filed Order appointing arbitrator. Ordered that application of the petitioner for order compelling arbitration & appointing an arbitrator is granted & Joseph C. Sweeney is appointed an arbitrator; Etc. Ordered that Fair Wind Maritime Corp. recover of Transworld Maritime Corp. its costs & disbursements be taxed by the Clerk. Pierce J. (mailed copy)
Dec. 19-73	Filed Memo. End. on motion dated 12/6/73. Motion denied. So Ordered Pierce J. (mailed notice)
Jan. 15-74	Filed Respondent Transworld Maritime Corp. Notice of Appeal from Final Order dated 12/17/73. (mailed notice)

Petition to Compel Arbitration

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

—————
In the Matter of the Arbitration

between

FAIR WIND MARITIME CORPORATION,
as Owners of the S.S. ISABENA,

Petitioner,

—and—

TRANSWORLD MARITIME CORPORATION,

Respondent.

—————

The petition of FAIR WIND MARITIME CORPORATION respectfully shows:

1. At all times hereinafter mentioned, Petitioner was a Panamanian corporation and Owners of the S.S. ISABENA.
2. Upon information and belief, at all times hereinafter mentioned, Respondent was, and still is, a foreign corporation doing business in New York through its agents, Admiralty Agencies Ltd., with an office at 17 Battery Place, Suite 1918, New York, New York 10004.
3. By Charter dated June 14, 1972 at New York, New York, Petitioner, as Owner of the S.S. ISABENA, agreed to

Petition to Compel Arbitration

let, and Respondent, as Charterer agreed to hire, the said S.S. ISABENA for a period of 15 to about 60 days for lightering operations at the port of Karachi.

4. The said Charter Party contains the following clause relating to arbitration:

“17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.”

5. Disputes arose between Petitioner and Respondent under the said Charter and thereafter Petitioner on June 7, 1972 made written demand upon Respondent for arbitration naming as an arbitrator Mr. Lloyd C. Nelson.

6. Respondent has failed and refused to appoint an arbitrator and the disputes have not been settled.

WHEREFORE, Petitioner moves this Court for an order appointing an arbitrator on behalf of Respondent and directing that thereafter the arbitration proceed forthwith in the manner provided in said contract of Charter Party and for such other, further and different relief as may be just in the premises.

Petition to Compel Arbitration

Dated: New York, New York
June 19, 1973.

HEALY & BAILLIE

By /s/ **NICHOLAS J. HEALY JR.**

A Member of the Firm

Attorneys for Petitioner

Office & P.O. Address

29 Broadway

New York, New York 10006

Telephone: 943-3980

**Memorandum in Support of Petitioner's Application
for an Order Compelling Respondent to
Proceed to Arbitration**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

Petitioner respectfully submits that it is entitled to the order sought herein. Such an order may be sought under the provisions of the United States Arbitration Act and in particular, under Section 4 thereof, 9 USC §4. That Section provides in part as follows:

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty or the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. * * * The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. * * *"

Respectfully submitted,

HEALY & BAILLIE,
Attorneys for Petitioner

NICHOLAS J. HEALY, JR.,
Of Counsel

Notice of Hearing on Petition to Compel Arbitration

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

PLEASE TAKE NOTICE that upon the annexed petition of Fair Wind Maritime Corporation, as Owners of the S.S. ISABENA, the undersigned will move this Court at a part thereof for the hearing of motions, to be submitted at Room 2601, United States Courthouse, Foley Square, New York, New York on the 9th day of July at 10 o'clock in the A.M. of that day, or as soon thereafter as counsel can be heard, for an order, pursuant to Sections 4 and 5, Title 9, United State Code, appointing an arbitrator and directing Respondent, Transworld Maritime Corporation to proceed to arbitration in accordance with the terms and conditions of a certain contract of Charter Party dated June 14, 1972 entered into between Petitioner, as Owners of the S.S. ISABENA, and Respondent, as Charterer, and for such other and further relief as the Court may deem just and proper.

Notice of Hearing on Petition to Compel Arbitration

Yours, etc.

HEALY & BAILLIE

By NICHOLAS J. HEALY, JR.

A Member of the Firm

Attorneys for Petitioner

29 Broadway

New York, N. Y. 10006

To:

TRANSWORLD MARITIME CORPORATION

c/o Admiralty Agencies Ltd.

17 Battery Place, Suite 1918

New York, New York 10004

**Affidavit of Helen M. Ryan in Opposition to
Motion to Compel Arbitration**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

HELEN M. RYAN, being duly sworn, deposes and says:

Deponent is an officer, to wit, the Treasurer of Transworld Maritime Corporation (Transworld) and makes this affidavit on information and belief in opposition to the motion of Petitioner, Fair Wind Maritime Corporation (Fair Wind) to arbitrate an alleged "dispute" between Fair Wind and Transworld.

This affidavit is based entirely upon information and documents supplied to deponent by Captain Gerald J. Ross of Admiralty Agencies, Ltd. which Corporation acted as agents for Transworld in the carrying out of its obligations under a certain Time Charter between Fair Wind and Transworld executed on June 14, 1972, a copy of which Time Charter is annexed to this agreement as Exhibit "A" and made a part hereof.

The Time Charter party was for the charter of the steamship "ISABENA" for about "minimum 15 to about 60 days lightening * * *." (Exhibit "A", line 14).

*Affidavit of Helen M. Ryan in Opposition to Motion
to Compel Arbitration*

Clause 1 of the Time Charter reads:

"1. That the Owners (FAIR WIND) shall provide and pay for all provisions, wages and consular shipping and discharge fees of the Crew; shall pay for the insurance of the vessel, also for the cabins, deck, engine room and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service." (Exhibit A, lines 36-38).

Clause 26 of the Time Charter reads:

"26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account." (Exhibit A, lines 170-171).

Deponent is informed by Captain Ross that Transworld fulfilled all of its obligations under the said Time Charter Party up to and including the 4th day of July 1972 when the SS ISABENA, the chartered steamship, was allegedly lost in heavy waters at the outer harbor of Karachi, Pakistan.

Furthermore, deponent has read all of the terms of the Charter Party and has discussed them with the attorneys for Transworld and is advised and verily believes that the said Time Charter party on its face relieves Transworld of any liability for any loss which occurred to Fair Wind because of the loss of the SS ISABENA.

*Affidavit of Helen M. Ryan in Opposition to Motion
to Compel Arbitration*

WHEREFORE, Respondent respectfully requests this Court to deny the Petition for an order appointing an arbitrator on behalf of Respondent and directing arbitration to proceed. Respondent further prays this Court for an order to be entered herein setting down for trial the issue of whether or not there is a "dispute" between the parties which is an appropriate subject matter for arbitration.

Dated: New York, N. Y.

July 19, 1973

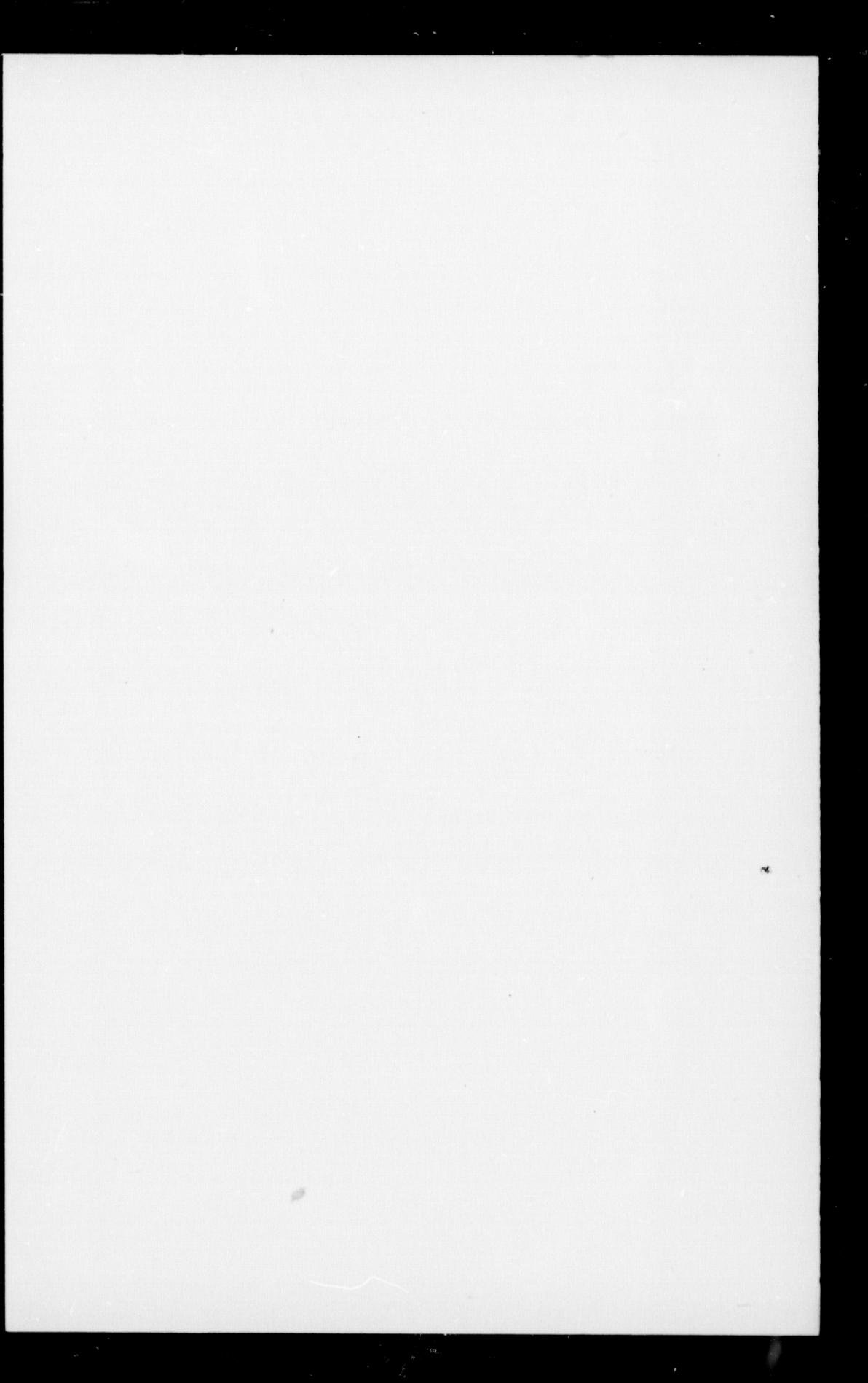
HELEN M. RYAN
*Treasurer of Transworld
Maritime Corporation*
c/o Admiralty Agencies, Ltd.
17 Battery Place
New York, N. Y. 10004

[Jurat omitted in printing.]

12a

EXHIBIT "A" ANNEXED TO AFFIDAVIT OF
HELEN M. RYAN

(See Opposite) 



James E. Parsons, Inc.

Charter Party
GOVERNMENT FORM

Approved by the New York Produce Exchange

November 6th, 1913—Amended October 20th, 1921; August 6th, 1931; October 3rd, 1946

1. This Charter Party, made and concluded in New York 14th day of June 1972
2. Between FAIR WIND MARITIME CORPORATION
3. Owners of the good Panamanian } Steamship } "ISABELA" of Panama
4. of 7,607 tons gross register, and 5,458 tons net register, having engines of indicated horse power
5. and with hull, machinery and equipment in a thoroughly efficient state, and classed highest in Lloyd's Register or equivalent
6. at of about 568,474 cubic feet cargo capacity, and about 10,779 tons of deadweight
7. deadweight capacity (cargo and bunkers, including fresh water and stores not exceeding one-half percent of ship's deadweight capacity),
8. allowing a deadweight of 500 tons on a draft of 28 feet 7 inches on Summer load, inclusive of permanent burden,
9. which are of the capacity of about
10. conditions about 14 knots on a consumption of about 40 tons of best Welsh coal—best grade, and/or best grade Bunker
11. coal
12. and TRANSWORLD MARITIME CORPORATION Charterers of the City of
13. That the said Owners agree to let, and the said Charterers agree to hire the said vessel, from the time of delivery, for
14. about minimum 15. to about 60 days, lightening, period in Charterers' option
15. Charterers to have liberty to sublet the vessel for all or any part of the time covered by this Charter, but Charterers remaining responsible for
16. the fulfilment of this Charter Party.
17. Vessel to be placed at the disposal of the Charterers, at a safe berth, in Charterers' option, Karachi
18. in such dock or at such wharf or place (where she may safely lie, always afloat, at all times of tide, except as otherwise provided in clause No. 6), as
19. the Charterers may direct. If such dock, wharf or place be not available time to count as provided for in clause No. 5. Vessel on her delivery to be
20. ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water closets, winches and
21. donkey boiler with sufficient steam power, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same
22. time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed, in carrying lawful merchandise,
23. including petroleum or its products, in proper containers, excluding grain and/or other lawful cargo and vacuumators
24. (unless to be employed in the carriage of live stock, but Charterers are to have the privilege of shipping a small number of live stock, if required),
25. the necessary and due requirements to be for account of Charterers, in such lawful trades, between any port and/or any part of the world,
26. America, and/or South America, and/or West Indies, and/or Central America, and/or Gulf of Mexico, and/or South Africa, and/or
27. Mexico, and/or South America, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River Amazon, River
28. Orinoco, River Amazonas, River Parana, River Paraguay, River Uruguay, River Parana, River Paraguay, River Uruguay, River
29. Amazon, and/or South America, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River Amazon, River
30. Orinoco, River Amazonas, River Parana, River Paraguay, River Uruguay, River Parana, River Paraguay, River Uruguay, River
31. Amazon, and/or South America, and/or Australia, and/or Tasmania, and/or New Zealand, but excluding Magdalena River, River Amazon, River
32. (See Clause 46)

as the Charterers or their Agents shall direct, on the following day.

1. That the Owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, including boiler water and maintain her clean and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service.

2. That the Charterers shall provide and pay for all the fuel except as otherwise agreed, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the Crew), and all other usual expenses except those before stated, but when the vessel puts into a port for causes for which vessel is responsible, then all such charges incurred shall be paid by the Owners. Fumigations ordered because of illness of the crew to be for Owners account. Fumigations ordered because of cargoes carried or ports visited while vessel is in port to be for Charterer's account.

Charterers are to provide necessary Dunnage and shifting boards, also any extra fittings requisite for a special trade or unusual cargo, but Owners to allow them the use of any Dunnage and shifting boards already aboard vessel. Charterers to have the privilege of using shifting boards for Dunnage, they making good any damage thereto.

4. That the Charterers shall pay for the use and hire of the said Vessel at the rate of **Twelve-Hundred-Seventy-Five Dollars** (\$1275.00)..... United States Currency per month, to be paid in Advance.

stores, on ~~the~~ ^{summer} ~~footboard~~, per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until the hour of the day of her re-delivery in like good order and condition, ordinary wear and tear excepted, to the Owners (unless lost) at ^{LCY} a safe port, in Charterers' option, Karachi/Colombo Range, unless otherwise

unless otherwise mutually agreed. Charterers are to give Owners not less than See Cl. 39 days
5. Payment of said hire to be made in New York in cash in United States Currency, remittances in advance, and for the last
part of same the approximate amount of time and 15 days weeks.

part of same the approximate amount of hire, and should same not cover the actual time, hire is to be paid for the balance day by day, as it becomes due, if so required by Owners, unless bank guarantee or deposit is made by the Charterers, otherwise failing the punctual and regular payment of the hire, or bank guarantee, or on any breach of this Charter Party, the Owners shall be at liberty to withdraw the vessel from the service of the Charterers, without prejudice to any claim they (the Owners) may otherwise have on the Charterers. Time to count from 7 a.m. on the working day following that on which written notice of readiness has been given to Charterers or their Agents before 1 p.m. but if it is not given

Cash for vessel's ordinary disbursements at any port may be advanced as required by the Captain, by the Charterers or their Agents, subject to 23½% commission and such advances shall be deducted from the hire. The Charterers, however, shall in no way be responsible for the application of such advances.

6. That the cargo or cargoes be laden and/or discharged in any dock or at any wharf or ~~place~~^{including alongside vessels} direct, provided the vessel can safely lie always afloat at any time of tide, except at such places where it is customary for similar size vessels to safely lie alongside.

7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stand) be made available for animal life vessels to enter.

Accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, stores, apparel, furniture, provisions, stores and fuel. Charterers have the privilege of carrying passengers as far as accommodations allow, Charterers paying Owners.....per day per passenger for accommodations and meals. However, it is agreed that in case any fines or extra expenses are incurred in the consequence of the carriage of passengers, Charterers are to bear such risk and expense.

8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and compensation, and is to be bound to obey such orders and directions.

3. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Charterers shall have the right to demand their removal.

10. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the vessel and see that voyages are prosecuted with the utmost despatch. He is to be furnished with free accommodation, and same fare as provided for Captain's table. Charters are not to be made for

rate of \$1.00 per day. Owners to virtual Pilots and Customs Officers, and also to the
Captains, Stevedores' Foremen, etc., Charterers paying \$1.00 per day, for all such services, \$1.00.

12. That the Captain shall, from time to time, with the requisite instructions and sailing directions, in writing, and the
Charters, their Agents or Supercargo, when required, with a true copy of daily Logs, showing the course of the vessel and distance run and the consumption of fuel.

12. That the Captain shall use diligence in caring for the ventilation of the cargo.
13. ~~That the Charterer shall have the option of retaining this charter for a further period of~~

—A single electron can be used to encode a bit of information, and can be manipulated by a laser beam.

14. Date if required by Charterers, time not to commence before: June 22, 1972 and should we have given written notice of readiness on or before: June 24, 1972 but not later than 4 p.m. Saturday to give the option of cancellation: Charterer's instructions

...to have the option of canceling this Charter at any time not later than the day of vehicle's readiness. EXHIBIT "A" 7.

1. Rivers, Merchant, Public and Canal Navigation, and affairs of Navigation throughout this Charter Party, always mutually excepted.
2. The vessel shall have the liberty to sail with or without pilot, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and property.

3. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men.

4. That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributions, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or deposit to be returned at once. Charterers will not suffer, nor permit to be continued, any lien or encumbrance incurred by them or their agents, which might have priority over the title and interest of the owners in the vessel.

5. That all cerelects and salvages shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses of Crew's proportion. General Average shall be adjusted, stated and settled, according to London Rules 1932, at such port or place in the United States as may be selected by the carrier, and as to matters not provided for by the Rules, according to the laws and usages at the port of New York. In such adjustment disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted into the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall be required, be made by the goods, shipper, consignee or owners of the goods to the carrier before delivery. Such deposit shall, at the option of the carrier, be payable in United States money and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the General Average and refunds or credit balances, if any, shall be paid in United States money.

~~In the event of accident, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, the shipper and the consignee, jointly and severally, shall contribute with the carrier in general average to the payment of any sacrifice, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully and in the same manner as if such salving ship or ships were owned by strangers.~~

6. Provisions as to General Average in accordance with the above are to be included in all bills of lading issued hereunder.

7. Fuel used by the vessel while off hire, also for cooking, condensing water, or for grates and stoves to be agreed to as to quantity, and the cost of replacing same, to be allowed by Owners.

8. That the vessel may be from time to time employed in tropical waters during the term of this Charter. Vessel is to be docked in convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every six months, reckoning from time of last painting and payment of the hire to be suspended until she is again in proper state for the service.

9. Owners shall maintain the gear of the ship as fitted, providing gear (for all derricks) capable of handling lifts up to five tons, also providing ropes, falls, slings and blocks. If vessel is fitted with derricks capable of handling heavier lifts, Owners are to provide necessary gear for same, otherwise equipment and gear for heavier lifts shall be for Charterers' account. Owners also to provide on the vessel lanterns and oil for night work, and vessel to give use of electric light when so fitted, but any additional lights over those on board to be at Charterers' expense. The Charterers to have the use of any gear on board the vessel.

10. Vessel to work overtime, if required by Charterers, and all wages to be at Charterers' disposal during loading and discharging. Steamer to provide one winchman per batch to work winches day and night, as required. Charterers agreeing to pay officers, engineers, winchmen, deck hands and donkeymen for overtime work done in accordance with the working hours and rates stated in the ship's articles. If the rules of the port, or labor unions, prevent crew from driving winches, shore winchmen to be paid by Charterers. In the event of a disabled winch or winches, or insufficient power to operate them, Owners to pay for shore engine, or engines, in Neu thereof, if required, and pay any loss of time occasioned thereby. (See Clause 23A)

11. It is also mutually agreed that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled "An Act relating to Navigation of Vessels, etc." in respect of all cargo shipped under this charter to or from the United States of America. It is further subject to the following clause, 24, of which is to be included in all bills of lading issued hereunder:

12. U. S. A. Clause Paramount
This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

13. ~~Both-to-Blame Collision Clause~~
If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners, the owners of said goods and set off, recouped or recovered by the other or non-carrying ship or her owners, against the carrier.

14. The vessel shall not be required to enter any ice-bound port, or any port where lights or light-ships have been or are about to be withdrawn by reason of ice, or where there is risk that in the ordinary course of things the vessel will not be able on account of ice to safely enter the port or to get out after having completed loading or discharging.

15. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew, and all other matters, same as when trading for their own account.

16. A commission of 5 per cent is payable by the Vessel and Owners to be deducted from hire by Charterers and is to be divided equally between Admiralty Agencies Ltd., Chartering Inc., James L. Parsons, Inc., and on hire earned and paid under this Charter, and also upon any continuation or extension of this Charter. Birt Potter & Hughes, Ltd.

17. 28. An adders commission of 2½ per cent payable on the hire earned and paid under this Charter.

U 4627

Clauses 23A, 29 to 55, as attached are to be considered as part of this Charter Party.

For Charterers:
TRANSWORLD MARITIME CORPORATION
By: ADMIRALTY AGENCIES LTD.
As Agents only.

RIDER TO CHARTER PARTY DATED JUNE 14, 1972
S/S "ISABENA"

- 23A. Vessel to work night and day, if required by Charterers, and all winches to be at Charterers' disposal during loading and discharging; steamer to provide one winchman per hatch to work winches day and night, as required, Charterers agreeing to pay Four Hundred Dollars (\$400.00) U.S. Currency per month or pro rata part thereof, in respect of overtime worked by ship's crew. If the rules of the port, or labor unions, prevent crew from driving winches, shore Winchmen to be paid by Charterers. In the event of a disabled winch or winches, or insufficient power to operate winches, Owners to pay for shore engine, or engines, in lieu thereof, if required, and pay any loss of time occasioned thereby, including any stevedore standby time.
29. Vessel to present clean for the carriage of grain to the full satisfaction of Receivers and/or Charterers' Representative. Owners to clean the vessel by washing and/or other method to ensure no effect on grain cargo by reason of prior transportation of coal or other commodities, such cleaning to be done at Owners' expense.
30. Vessel to load cargo from the mother vessel or another vessel to its maximum safe draft; thence, at the instructions of the Charterers, it will proceed to discharge the cargo or lighten sufficient cargo so that it may proceed to port of discharge to discharge the balance of the cargo.
31. Charterers do not intend to grain fit vessel but may do so at Charterers' time and expense. See Clause 45 46
32. After the lightening vessel has loaded grain from the mother vessel, it will proceed to discharge port or place. If any bagging is required by port and local authorities, Charterers will do the necessary amount of bagging at their risk and expense.
33. Vessel's consumption in port or at anchor, with winches working about 8/10 tons Bunker C Fuel Oil per day and about 6/8 tons Bunker C Fuel Oil per day lying idle without working ship's gear or winches.
34. Not applicable.
35. Master of the vessel is to extend full cooperation to Charterers' Representative tying up his vessel to be lightened and if anchor chain is necessary to secure the vessel, the Master is to allow the use of said anchor chain.

36. An on-hire survey consisting of a visual inspection of the ship's sides shall be held when vessel comes alongside the mother ship; Charterers are not to be responsible for any loss or damage which may occur during the lightening operation.
37. If the dry cargo lightening vessel is damaged by the stevedores at the discharging port, they shall be notified in writing of such at the end of the shift during which damage occurred. The failure of the Master to give notice of damages herein provided shall be deemed a waiver of Owners' right to claim reimbursement.
38. When requested by the Charterers, the vessel should accommodate stevedores on-deck and supply them daily with their requirements of fresh water for washing, cooking and drinking purposes. Charterers paying for the cost of providing this water.
39. A final notice of redelivery is to be given to the Master, Owners, Agent or Representative a minimum of three (3) days prior to redelivery. A tentative notice of approximate redelivery shall be given about seven (7) days prior to redelivery.
40. Captain of the vessel to issue Mates Receipt on completion transfer of cargo from mother ship, or another vessel and Master to authorize Charterers or their Agents to sign Bills of Lading on their behalf.
41. The vessel's Owner or operator certifies that the vessel which will perform under this Charter Party has not called at any North Vietnam port on or after January 1, 1963, nor at any Cuban port on or after January 1, 1962, and will not call at any of these ports prior to performing this contract. The vessel's Owner or operator shall be liable to A.I.D., and to any other United States Governmental Agency and to the Charterers for all claims and damages whatsoever arising from the breach of this warranty.
42. As the vessel may be required to transfer vacuators, each not exceeding five (5) tons, from one vessel to another or to shore with ship's gear, it is understood that the vessel's booms, winches and tackle are capable of handling said vacuators and that winchmen will be supplied free of charge from the ship's crew.

RIDER TO CHARTER PARTY DATED JUNE 14, 1972
S/S "ISADENA"

43. The lightening vessel will be a geared oceangoing vessel, shall be classed and maintained 100-A1 in Lloyd's Register or equivalent and shall be fully seaworthy, ready and clean for the carriage of grain. Lightening vessels to be in possession of a certificate from Licensed Surveyor inter alia stating that the winches and cargo gear are in good working order in conformation with local government and/or labor regulations and all cargo compartments are entirely in fit condition to receive grain.
44. New Jason Clause, New Both-to-Blame Collision Clause and C.S.U.K. War Risks Clauses Nos. 1 and 2, as attached hereto, to be considered as part of this Charter Party.
45. The vessel to be redelivered as left by Receivers' stevedores on completion of discharge. Charterers to pay Owners Six Hundred Dollars (\$600.00) U.S. Currency as compensation for taking delivery of the vessel with holds as left by stevedores but Charterers are to have the option of performing the cleaning in order to place the vessel in a similar condition as when delivered.
46. Charterers intend to lighten grain from alongside another vessel and/or vessels at or off ports or places East Coast India, including Sandheads/Saugor Range, and/or ports or places East Coast Pakistan, including South Patches and Kutubedia, and/or ports or places West Pakistan, but Charterers to have the option for trading within full Institute Warranty Limits; all berthing arrangements for Charterers' account,
47. If requested by Charterers or their representative, vessel to proceed and separate from alongside mother vessel or other vessels without pilots.
48. The Owners authorize Charterers, as agents for and on behalf of the Owners, and on behalf of the vessel, to arrange and contract for any towage, pilotage or like services on any usual or customary terms and/or those terms offered or required by the towing companies employed where such services are furnished, including but not by way of limitation, so-called pilotage clauses, such as those making pilots or tugboat captains and the like, or other servants of the assisted vessel and of her Owners, and the Owners ratify any such contract made by the Charterers.
49. In the event that the mother ship should be lost or sustain serious average, which would frustrate the contemplated lighterage the Charterers to have the option of cancelling this Charter Party.
50. Hire to be paid to The Hongkong and Shanghai Banking Corporation, 80 Pine Street, New York, New York 10005, for credit of Fair Wind Maritime Corp.

51. Vessel's other details, as follows:

Flag: Panamanian Built: 1945 Gear: 14 x 5 tons Constants: Abt 200 ton
Decks: 2 Third deck numbers 1, 2, 3 and 4 holds. Lower Tweendeck in No. 4 hold
wooden construction and removable.
5 Holds/5Hatches: No trimming hatch but can trim holds in tweendeck if necessary.
Bale: About 492,994 cu. ft.
Lower Hold Capacity: No. 1 - 32,690 cu. ft. grain, No. 2 - 33,095 cu. ft. grain,
No. 3 - 62,340 cu. ft. grain, No. 4 - 58,675 cu. ft. grain,
No. 5 - 32,385 cu. ft. grain. Total grain does not include
deeptank.

52. In case any off-hire occurs in accordance with Charter Party, such off-hire to count
for the purpose of calculation of the minimum period, but Charterers have the option
to extend the maximum period of the Charter Party by such off-hire.

53. That the Charterers, at the port of delivery, and the Owners, at the port of redelivery,
shall take over all fuel remaining on board the vessel, the vessel to be delivered with
about 250/300 long tons of Bunker C. The vessel to be redelivered with sufficient
bunkers to reach next bunkering port. Bunkers to be settled on final hire payment at
the rate of Twenty-Three Dollars (\$23.00) U.S. Currency per longton.

54. Charterers' option to load aboard vessel prior to delivery their vacuators and
accessories at Charterers' expense.

55. Any Indian/Pakistan duty on stores for Owners' account. Any tax imposed by Pakistan
and/or Indian government on fuel oil consumed during this Charter to be for Charterers'
account. Charterers to post guarantee of the same if such is required.

**Supplemental Affidavit of Nicholas J. Healy, Jr.,
in Support of Motion to Compel Arbitration**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

NICHOLAS J. HEALY, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Healy & Baillie, attorneys for the petitioner herein. I am familiar with the circumstances underlying petitioner's motion to compel arbitration and with prior proceedings had herein.
2. Respondent opposes the motion to compel arbitration on the grounds that the petition failed to set forth an arbitrable "dispute" and that in any event the terms of the contract under which petitioner seeks arbitration relieve respondent of any liability. Neither of these are valid grounds for opposing arbitration. On June 7, 1973 defendant wrote to respondent to inform them that petitioner was making claim for the loss of the ISABENA and for various expenses and liabilities which might be incurred as a consequence of the Vessel becoming lost. A true copy of the said letter is annexed hereto and made a part hereof as Exhibit "A". Subsequent to writing the June 7th letter

*Supplemental Affidavit of Nicholas J. Healy, Jr.,
in Support of Motion to Compel Arbitration*

deponent discussed the case with attorneys for respondent and advised such attorneys that petitioner's bases for the claim for the loss of the Vessel were breach of respondent's Charter Party obligations, including the obligation properly to load and stow the Vessel. Accordingly, respondent is fully aware of the "dispute" which consists precisely of petitioner's claim for the loss of the Vessel and respondent's denial of liability for such loss.

3. Respondent's other grounds for avoiding arbitration is similarly without foundation. Respondent submits in opposition to the motion an affidavit from the treasurer of respondent which does no more than recite as hearsay a legal conclusion to the effect that respondent complied with its Charter Party obligations and therefore is not liable to petitioner. Whether respondent in fact complied with its Charter Party obligations is of course the function of arbitrators to determine. At best respondent's affidavit represents an inadequate application for a summary judgment of non-liability, and even as such the application is plainly addressed to the wrong forum.

WHEREFORE, petitioner respectfully requests this Court grant petitioner's motion to compel arbitration.

NICHOLAS J. HEALY, JR.

[Jurat omitted in printing.]

EXHIBIT A ANNEXED TO SUPPLEMENTAL
AFFIDAVIT OF NICHOLAS J. HEALY, JR.

June 7, 1973

Transworld Maritime Corporation
c/o Admiralty Agencies Ltd.
17 Battery Place
New York, New York 10004

Re: "ISABENA"
C/P dated June 14, 1972

Dear Sirs:

We represent the Owners of the ISABENA in connection with their claims arising out of the captioned Charter Party. Owners' claims are for the loss of the Vessel and various expenses and liabilities which may be incurred as a consequence of the Vessel capsizing at the port of Karachi.

On behalf of Owners we demand arbitration and appoint as an arbitrator Mr. Lloyd C. Nelson of Global Chartering and Brokerage Co., Inc., 29 Broadway, New York, N.Y. 10006. Please promptly appoint your arbitrator, failing which we shall be obliged to petition the court to appoint one on your behalf.

Very truly yours,

HEALY & BAILLIE

By: NICHOLAS J. HEALY, JR.

NJHjr:jp

CERTIFIED MAIL—
Return Receipt Requested

Motion to Alter or Amend Decisions

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[CAPTION OMITTED]

SIRS:

PLEASE TAKE NOTICE that Respondent, Transworld Maritime Corporation, respectfully moves this Court to alter or amend its Decision rendered herein August 29, 1973 insofar as the Court found that Respondent Transworld Maritime Corporation must proceed to arbitration of this matter and is not entitled to have it set down for trial.

This motion to Alter or Amend the prior decisions on the respective motions should be granted because, as is more fully explained in the annexed memorandum and the affidavit of Captain Gerald J. Ross, sworn to September 25, 1973, thereunto annexed, Respondent did not point out in its moving papers on the original motions the facts surrounding the loss of the S.S. ISABENA nor the complexity of the legal issues involved in this matter or the desire for trial by jury of the issues of fact which must now become of vital importance to the outcome of this matter.

Respondent's original motion was made strictly on the basis of the terms of the Charter Party which Respondent believed exonerated it from responsibility in the premises and thus justified Respondent's motion to have all issues determined by Trial.

Motion to Alter or Amend Decisions

Respondent now moves to have this matter referred for trial before this Court for the reason that the legal questions involved are of such a complicated nature that they should not be left to the decision of "commercial men" but should be decided by a court of law in a duly constituted jury trial.

Dated: New York, New York

September 25, 1973

GIFFORD, WOODY, CARTER & HAYS
Attorneys for Respondent
Office and P. O. Address
One Wall Street
New York, New York 10005
Telephone: 344-0470

To:

HEALY & BAILLIE
Attorneys for Petitioner
29 Broadway
New York, New York

**Affidavit of Captain Gerald J. Ross in Support
of Motion to Alter or Amend Decision**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

◆◆◆
[CAPTION OMITTED]
◆◆◆

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Captain GERALD J. Ross, being duly sworn, deposes and says:

Deponent is an officer, to wit, the President of ADMIRALTY AGENCIES, LTD., Agents for TRANSWORLD MARITIME CORPORATION (TRANSWORLD) in connection with the transaction between Respondent and Petitioner with respect to the s.s. ISABENA and makes this affidavit in support of TRANSWORLD's (Respondent) motion to alter or amend decisions concerning the motion of FAIR WIND MARITIME CORPORATION (FAIR-WIND) as Petitioner, to compel arbitration of an alleged "dispute" between FAIR WIND and TRANSWORLD.

1. On June 14, 1972, I negotiated with FAIR WIND, on behalf of TRANSWORLD a time charter for the hire of the s.s. "ISABENA" for "15 to about 60 days lightening".
2. The ISABENA delivered to TRANSWORLD at Karachi on June 23rd.

*Affidavit of Captain Gerald J. Ross in Support of Motion
to Alter or Amend Decision*

3. The ISABENA commenced loading grain from the s.s. OVERSEAS JOYCE, off Karachi on June 24, 1972.
4. The ISABENA completed loading on June 30th and berthed in Karachi.
5. The ISABENA returned to Karachi outer anchorage late on the evening of July 3, 1972.
6. The ISABENA sank at approximately 0730 on July 4, 1972. The Master and four crew members were lost.
7. On or about July 11, 1972 surviving crew members were repatriated to Taipei.
8. On July 24, 1972 the wreck of the ISABENA was allegedly struck by the Pakistan freighter "ABASIN", which sank as a result thereof.
9. On August 5, 1972 a Notice of Abandonment of the ISABENA was published in the "MORAD SHIPPING NEWS" of Karachi.
10. Between June 23, 1972 and June 6, 1973 there was no correspondence from FAIR WIND concerning the loss of the "ISABENA".
11. On June 7, 1972, Healy & Baillie, attorneys for FAIR WIND made a written demand for arbitration of FAIR WIND's claim for the loss of the ISABENA and various expenses and liabilities which may be incurred as a consequence thereof.

*Affidavit of Captain Gerald J. Ross in Support of Motion
to Alter or Amend Decision*

In view of the above sequence of events it is TRANSWORLD's contention that no disputes were raised or exist between the parties which are proper subjects for arbitration by "commercial men." Inasmuch as FAIR WIND is making a claim for the full value of the "ISABENA" and raises other consequential legal issues, the matter requires judicial determination as to all of the issues, factual and legal. In agreeing to the arbitration clause, there was no contemplation by undersigned that the arbitration clause covered the loss of the "ISABENA".

This affidavit is respectfully submitted in support of TRANSWORLD's motion to Alter or Amend its decision with respect to compelling TRANSWORLD to submit to arbitration in the instant case and to direct the parties to go to trial.

Captain GERALD J. Ross

[Jurat omitted in printing.]

**EXHIBIT "A" ANNEXED TO AFFIDAVIT OF
GERALD J. ROSS**

The exhibit attached hereto is a copy of the Time Charter between Fair Wind and Transworld, executed June 14, 1972. It is reproduced heretofore as Exhibit "A" to the Affidavit of Helen M. Ryan.

**Affidavit of Nicholas J. Healy, Jr., in Opposition
to Motion to Alter or Amend Decision**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

—————
[CAPTION OMITTED]
—————

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

NICHOLAS J. HEALY, JR., being duly sworn, deposes and says:

1. I am a member of the firm of Healy & Baillie, attorneys for the Petitioner. I am familiar with the prior proceedings herein and submit this affidavit in opposition to Respondent's motion "to alter or amend" the prior decision of this Court which granted Petitioner's application to compel the Respondent to arbitrate certain disputes. Additionally, Petitioner respectfully requests that it be awarded the sum of \$500 for attorneys' fees incurred by reason of Respondent's frivolous and dilatory efforts to avoid arbitration.

2. Petitioner was the Owner, and Respondent the Charterer, of the Vessel S.S. ISABENA under a New York Produce Exchange Form Charter Party dated at New York on June 14, 1792. The ISABENA was lost while in Charterer's service and Owners demanded an arbitration of the issue of the liability for the consequences of such loss. Charterer

*Affidavit of Nicholas J. Healy, Jr., in Opposition to
Motion to Alter or Amend Decision*

opposed the motion to compel arbitration on the ground that there was no dispute to be arbitrated because a charter clause was assertedly clear and specific in exonerating Charterer. The Court granted the petition to compel arbitration and denied Respondent's cross-motion for a jury trial, without opinion. Now Respondent argues, in complete reversal of its previous position, that the "complexity of the matters involved in this proceeding are so great and so legalistic" that the Court, in its discretion, should set the matter down for trial by judge and jury, rather than compel an arbitration before a panel of commercial men as agreed between the parties. It should be noted that in addition to misstating the responsibility of the Court in respect of arbitration petitions, Respondent has also overlooked the fact that jury trials are not available in admiralty actions generally.

3. Title 9 U.S.C. §2 provides that

"A written provision in any maritime transaction . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon any such grounds as exist at law or in equity for the revocation of any contract."

4. Section 4 of the Federal Arbitration Act provides that "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the Court *shall* make an order directing the

parties to proceed to arbitration . . ." (Emphasis supplied). The Court has already found that the agreement to arbitrate in this case is valid and that the dispute arose under the charter agreement. Indeed, Respondent has not even disputed the making of the agreement to arbitrate.

The Supreme Court, in considering the Arbitration Act, has stated:

" . . . a federal court may consider only issues relating to the making and performance of the agreement to arbitrate. In so concluding, we not only honor the plain meaning of the statute, but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts.

* * * * *

Federal courts are bound to apply rules enacted by Congress with respect to matters . . . over which it has legislative power." *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 404, 406 (1967).

5. It is respectfully submitted that the Court does not possess the discretion, urged by Respondent, to determine that an issue is too complex for commercial arbitrators. It is worthwhile to note that Respondent refers to a nineteenth century English case report in support of its contention, although it has been noted that the purpose of the United States Arbitration Act is to shake off the old judicial hostility to commercial arbitration and "we should not

*Affidavit of Nicholas J. Healy, Jr., in Opposition to
Motion to Alter or Amend Decision*

follow English or other decisions which have narrowly construed the terms of arbitration agreements or arbitration statutes." *Kulukundis Shipping Co. S.A. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2nd Cir. 1942).

6. Respondent also urges the Court to reconsider its finding that the subject dispute is within the meaning of the arbitration clause because the issues "are not commercial matters. They were not within the contemplation of the parties when they signed the Charter Party." Clause 17 of the charter party calls for the arbitration of "any dispute . . . between Owners and the Charterers." The Court of Appeals considered an identical clause in *In re Canadian Gulf Line*, 98 F.2d 711 (2nd Cir. 1938) wherein the Court stated:

"But though the claims are not strictly for breaches of the charter party itself, we think they come within the broad terms of the clause which subjects to arbitration 'any dispute * * * between the Owners and the Charterers * * *'. We can have little doubt that the parties had in mind and expressed by the words 'should any dispute arise' in Clause 17 an intention to submit to arbitration, rather than to judicial decision, any disputes arising out of the maritime venture initiated by the charter party." * * *

The Court went on to note that:

"Arbitration sometimes involves perils that even surpass the 'perils of the seas' . . . whether in any par-

*Affidavit of Nicholas J. Healy, Jr., in Opposition to
Motion to Alter or Amend Decision*

ticular instance it is a desirable risk is not for us to say. It is a mode of procedure fostered by statute and in the present case invoked under the agreement of the parties. If they consent to submit their rights to a tribunal with extensive powers and subject to a most restricted review, they cannot expect the courts to relieve them from the effect of their deliberate choice."

In *Hilti Inc. v. Oldach*, 392 F.2d 368, 373 (1st Cir. 1968), the Court noted that:

"The broad language of the arbitration clause forces us to conclude that the parties intended to arbitrate all disputes arising thereunder irrespective of whether they were foreseeable at the time of agreement."

7. The grounds of Respondent's initial opposition to the Petition herein were, in Deponent's opinion, so baseless and in conflict with well established law as to be frivolous. This motion for a reargument, it is respectfully submitted, is even more indefensible. Not only is the application without legal foundation, but it raises no material facts not made available to the Court on the previous hearing (although a perfunctory affidavit has been added, purportedly sworn to on personal knowledge, but manifestly made on hearsay and personal opinion), and it is in fact in direct conflict with Respondent's prior arguments. It is apparent that the whole of Respondent's opposition has resulted in an unwarranted frustration of the federal purpose to avoid "delay and obstruction in the courts" in relation to arbitration proceedings.

*Affidavit of Nicholas J. Healy, Jr., in Opposition to
Motion to Alter or Amend Decision*

In *Munson Line v. Green*, 6 F.R.D. 470 (SDNY, 1947), a defendant's similar dilatory tactics resulted in the Court awarding the plaintiff \$250 legal fees. See also Rule 56(g) which mandates that the Court award attorneys' fees where affidavits are submitted on summary judgment motions in bad faith or for the purpose of delay. It is respectfully submitted that the instant case is a particularly appropriate one for an award of attorneys' fees and that the sum of \$500 is reasonable for such purpose.

NICHOLAS J. HEALY, JR.

[Jurat omitted in printing.]

**Memorandum Opinion of the Honorable
Lawrence W. Pierce**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2722

In the Matter of the Arbitration

between

FAIR WIND MARITIME CORPORATION,
as Owners of the S.S. ISABENA,

Petitioner,

and

TRANSWORLD MARITIME CORPORATION,

Respondent.

Appearances:

NICHOLAS J. HEALY, JR., Esq.

HEALY & BAILLIE

29 Broadway

New York, New York 10006

Attorney for Petitioner

HARRINGTON HARLOW, Esq.

GIFFORD, WOODY, CARTER & HAYS

One Wall Street

New York, New York 10005

Attorney for Respondent

LAWRENCE W. PIERCE, D.J.

*Memorandum Opinion of the Honorable
Lawrence W. Pierce*

MEMORANDUM OPINION

Petitioner is a Panamanian corporation and the owner of the S.S. Isabena. Respondent is a foreign corporation doing business in New York through an agent.

The parties entered into a Charter Party on June 14, 1972, for a time charter for the S.S. Isabena for 15 to about 60 days for lightening operations at the port of Karachi. During this period and while in the possession of respondent, the vessel was loaded with grain and several days later, on July 4, 1972, sank. The Master and four crew members lost their lives.

Almost one year later, on June 7, 1973, petitioner's attorneys made a written demand for arbitration of petitioner's claims for "the loss of the Vessel and various expenses and liabilities which may be incurred as a consequence of the vessel capsizing at the Port of Karachi."

Upon respondent's failure to appoint an arbitrator, as requested by petitioner, petitioner sought, pursuant to Title 9, United States Code, Sections 4 and 5, to have this court appoint an arbitrator and direct respondent to proceed to arbitration "in accordance with the terms and conditions of [the] Charter Party . . ." Paragraph 17 thereof provides as follows:

"17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall

*Memorandum Opinion of the Honorable
Lawrence W. Pierce*

be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

Respondent opposed the petitioner's motion asserting that "the said Time Charter Party on its face relieves [respondent] of any liability for any loss which occurred to petitioner because of the loss of the S.S. Isabena." Respondent relied upon Clauses 1 and 26 of the Charter Party which read:

"1. That the Owners (FAIR WIND) shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engineroom and other necessary stores, including boiler water and maintain her class and keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service."

"26. Nothing herein stated is to be construed as a demise of the vessel to the Time Charterers. The owners to remain responsible for the navigation of the vessel, insurance, crew and all other matters, same as when trading for their own account."

Respondent requested a trial of "the issue of whether or not there is a 'dispute' between the parties which is an appropriate subject matter for arbitration."

This Court having concluded, from the affidavits submitted, that no issue existed as to the making of the agreement for said arbitration or the failure to comply there-

*Memorandum Opinion of the Honorable
Lawrence W. Pierce*

with, and rejecting respondent's request that the Court determine whether a "dispute" appropriate for arbitration existed, granted petitioner's motion to compel arbitration and denied respondent's motion for a trial of the above-stated issue, and directed the petitioner to submit an order on notice to respondent.

Respondent now moves to alter or amend the aforesaid decisions and to have this matter referred for trial on the merits by this Court for the reason that the legal questions involved are of such a complicated nature that they should not be left to the decision of "commercial men" but, in the exercise of discretion, should be decided by a court of law in a duly constituted jury trial.

Respondent further contends that "[i]nasmuch as Fair Wind [petitioner] is making a claim for the full value of the 'Isabena' and raises other consequential legal issues, the matter requires judicial determination as to all of the issues," factual and legal. Respondent asserts that in agreeing to the arbitration clause, there was no contemplation by the respondent that the arbitration would cover the loss of the vessel.

This Court would have jurisdiction in admiralty of the subject matter of the suit herein arising out of the controversy between the parties (28 U.S.C. 1333) save for the written agreement which provides for arbitration (9 U.S.C. 4).

There is no dispute regarding the assertion that the parties entered into the agreement which contains the arbitration clause or that the respondent has failed to comply therewith. In discussing 9 U.S.C. 3, the U.S. Supreme Court

*Memorandum Opinion of the Honorable
Lawrence W. Pierce*

in *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) instructs that "... a federal court may consider only issues relative to the making and performance of the agreement to arbitrate."

The argument that certain issues could not have been contemplated by the parties at the time they entered into the charter party and agreed to arbitrate disputes is resolved by applying to the instant facts the language of *Hilti, Inc. v. Oldach*, 392 F.2d 368, 372-3 (1st Cir. 1968): "The short answer is that the portion of the arbitration clause which reads 'Any controversy or claim arising out of or relating to the breach thereof shall be settled by arbitration' cannot be construed so narrowly The broad language of the arbitration clause forces us to conclude that the parties intended to arbitrate all disputes arising thereunder irrespective of whether they were foreseeable at the time of agreement." See also *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942).

Judge Augustus N. Hand in *Canadian Gulf Line v. Continental Grain Co.*, 98 F.2d 711 (2d Cir. 1938) wrote: "The dispute here arose out of a 'maritime transaction' and there was an agreement stated in the broadest terms to submit such disputes to arbitration Arbitration sometimes involves perils, that even surpass 'perils of the seas' Whether in any particular instance it is a desirable risk is not for us to say. It is a mode of procedure fostered by statute and in the present case invoked under the agreement of the parties. If they consent to submit their rights

*Memorandum Opinion of the Honorable
Lawrence W. Pierce*

to a tribunal with extensive powers and subject to a most restricted review, they cannot expect the courts to relieve them from the effect of their deliberate choice." *Id.* at 714 (citation omitted).

Judge Harold Medina in *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 410 (2d Cir. 1959) held that section 2 of the Arbitration Act "makes 'valid, irrevocable and enforceable' only a 'written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction'" He added that "any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." *Id.*

Based upon the foregoing, respondent's motion to alter or amend the Court's decision of August 29, 1973 is denied. Petitioner's application for an award of attorney's fees is denied. This Court, of course, expresses no view as to the merits of the controversy. But in denying petitioner's application for attorney's fees, the Court notes that the motion of respondent, while not sustained, raises issues which are not deemed frivolous.

So ORDERED.

Dated: New York, New York
November 27, 1973

LAWRENCE W. PIERCE
U.S.D.J.

Order Appointing Arbitrator

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civil 2722 LWP

In the Matter of the Arbitration

between

FAIR WIND MARITIME CORPORATION,
as Owners of the S.S. ISABENA,

Petitioner,

—and—

TRANSWORLD MARITIME CORPORATION,

Respondent.

A petition having been filed by FAIR WIND MARITIME CORPORATION, as Owners of the S.S. ISABENA, pursuant to the provisions of 9 U.S.C. §§4 and 5, praying for an order appointing an arbitrator and directing respondent Transworld Maritime Corporation to proceed to arbitration of a dispute arising under a certain contract of Charter Party dated June 14, 1972, pursuant to the provisions of Clause 17 of said Charter Party, and said petition having come on for hearing after due service of a notice of motion therefor, and the Court having considered the affidavits of Nicholas J. Healy, Jr. and Helen M. Ryan and the arguments of counsel in support of and in opposition to

Order Appointing Arbitrator

the application, and after due deliberation thereon, and on filing the decision of the Court on August 29, 1973, and it appearing to the satisfaction of the Court that the making of the agreement for said arbitration or the failure to comply therewith is not in issue, and the respondent having moved to alter or amend the aforesaid decision and the Court, upon considering the affidavit of Gerald J. Ross in support and of Nicholas J. Healy, Jr. in opposition thereto, having denied said motion to amend by opinion number 40058 dated November 27, 1973, it is

ORDERED, that the application of the petitioner for an order compelling arbitration and appointing an arbitrator herein be and the same hereby is granted and that Joseph C. Sweeney be and he hereby is designated and appointed an arbitrator; and that the said Joseph C. Sweeney shall act under the said contract to arbitrate between the parties herein with the same force and effect as if he had been nominated by the respondent herein, and it is further

ORDERED, that Fair Wind Maritime Corporation, petitioner herein, recover of Transworld Maritime Corporation, respondent herein, its costs and disbursements in this proceeding, to be taxed by the Clerk.

Dated: December 17, 1973
at New York, N.Y.

LAWRENCE W. PIERCE
U.S.D.J.

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Civil 2722 LWP

In the Matter of the Arbitration

between

FAIR WIND MARITIME CORPORATION,
as Owners of the S.S. ISABENA,

Petitioner,

—and—

TRANSWORLD MARITIME CORPORATION,

Respondent.

S I R S :

PLEASE TAKE NOTICE THAT Respondent, Transworld Maritime Corporation, hereby appeals to the United States Court of Appeals for the Second Circuit from each and every part of the Final Order entered herein on December 17, 1973, denying Respondent's motion to alter and amend the decision of the Court rendered on August 29, 1973 and appointing an Arbitrator for Respondent.

Notice of Appeal

New York, New York
January 15, 1974

Original signed by:

H. Barton Williams
H. BARTON WILLIAMS

c/o CHARLES L. TROWBRIDGE, Esq.
MESSRS. GIFFORD, WOODY, CARTER & HAYS
One Wall Street
New York, New York 10005
*Attorney for Respondent, Trans-
world Maritime Corporation*

MESSRS. GIFFORD, WOODY, CARTER & HAYS
CHARLES L. TROWBRIDGE
OVERTON T. HARRINGTON, JR.
JOHN E. GALLOWAY
Of Counsel

To:

CLERK
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

HEALY & BAILLIE
26 Broadway
New York, New York 10006

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Service of ~~three~~ (3) copies of the
within Joint Appendix is hereby
admitted this 13th day of March 1974

Walter J. Baillie
Attorney for